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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09 265,606	03 10 1999	RAINER ZIMMERMANN	LUD5330.3DIV	4727

24972 7590 09 11 2003  
FULBRIGHT & JAWORSKI, LLP  
666 FIFTH AVE  
NEW YORK, NY 10103-3198

EXAMINER

ART UNIT PAPER NUMBER

DATE MAILED: 09 11 2003

27

Please find below and/or attached an Office communication concerning this application or proceeding.

**Communication Re: Appeal**

**Application No.**

09/265,606

**Applicant(s)**

ZIMMERMANN ET AL.

**Examiner**

Marjorie A. Moran

**Art Unit**

1631

**-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

1. ☐ The Notice of Appeal filed on \_\_\_\_\_ is not acceptable because:

- (a) ☐ it was not timely filed.
- (b) ☐ the statutory fee for filing the appeal was not submitted. See 37 CFR 1.17(b).
- (c) ☐ the appeal fee received on \_\_\_\_\_ was not timely filed.
- (d) ☐ the submitted fee of \$\_\_\_\_\_ is insufficient. The appeal fee required by 37 CFR 1.17(b) is \$\_\_\_\_\_.
- (e) ☐ the appeal is not in compliance with 37 CFR 1.191 in that there is no record of a second or a final rejection in this application.
- (f) ☐ a Notice of Allowability, PTO-37, was mailed by the Office on \_\_\_\_\_.

2. ☒ The appeal brief filed on 6/2/03 is NOT acceptable for the reason(s) indicated below:

- (a) ☐ the brief and/or brief fee is untimely. See 37 CFR 1.192.
- (b) ☐ the statutory fee for filing the brief has not been submitted. See 37 CFR 1.17(c).
- (c) ☐ the submitted brief fee of \$\_\_\_\_\_ is insufficient. The brief fee required by 37 CFR 1.17(c) is \$\_\_\_\_\_.

(d) ☒ the submitted brief is deficient at least in part as follows:

**The appeal in this application will be dismissed unless corrective action is taken to timely submit the brief and requisite fee. Extensions of time may be obtained under 37 CFR 1.136(a).**

3. ☐ The appeal in this application is DISMISSED because:

- (a) ☐ the statutory fee for filing the brief as required under 37 CFR 1.17(c) was not timely submitted and the period for obtaining an extension of time to file the brief under 37 CFR 1.136 has expired.
- (b) ☐ the brief was not timely filed and the period for obtaining an extension of time to file the brief under 37 CFR 1.136 has expired.
- (c) ☐ Request for Continued Examination (RCE) under 37 CFR 1.114 was filed on \_\_\_\_\_.
- (d) ☐ other: \_\_\_\_\_

4. ☐ Because of the dismissal of the appeal, this application:

- (a) ☐ is abandoned because there are no allowed claims.
- (b) ☐ is before the examiner for final disposition because it contains allowed claims. Prosecution on the merits remains CLOSED.
- (c) ☐ is before the examiner for consideration of the submission and prosecution has been reopened pursuant to 37 CFR 1.114.

**NOTIFICATION OF DEFECTIVE APPEAL BRIEF**

The appeal brief filed as Paper Number 26 on 6/2/03 is defective under 37 CFR 1.191 because arguments therein are directed to issues which are not appealable. Specifically, claim 22, which was subject to restriction and withdrawn from examination, is still pending. Appellant's traversal of the restriction is a petitionable matter for the Commissioner of Patents and Trademarks under 37 CFR 1.144. Appellant is reminded that while a petition under 37 CFR 1.144 may be deferred until after final action on or allowance of claims to the invention, the petition must be filed not later than appeal. Applicant should note that the Board of Patent Appeals and Interferences will not ordinarily hear a question which it believes should be decided by the Commissioner. See MPEP 1201 and MPEP 706.01.

Appellant is required to cancel withdrawn claim(s) or petition to the Commissioner as set forth under 37 CFR 1.144.

To avoid dismissal of the appeal, Appellant must respond appropriately within the longest of any of the following TIME PERIODS: (1) ONE MONTH or THIRTY DAYS, whichever is longer, from the mailing of this communication; (2) within the time period for reply to the action from which appeal has been taken; or (3) within two months from the date of the notice of appeal under 37 CFR 1.191. Extensions of these time periods may be granted under 37 CFR 1.136.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Marjorie A. Moran whose telephone number is (703)

Art Unit: 1631

305-2363. The examiner can normally be reached on Monday to Friday, 7:30 am to 4 pm EST.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael Woodward can be reached on (703) 308-4028. The fax phone number for the organization where this application or proceeding is assigned is (703) 872-9306.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 305-3524.

MRS JORIE MORAN  
RECEIVED EXAMINER

*Joyce L. Moran*

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